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Honorable David Stockman
Director, Office of Management
and Budget
Washington, D.C.

Dear Mr. Stockman:

This is in response to your request of August 1, 1984 for the views of the Department of Justice concerning the draft bill amending the State Department's Basic Authorities Act. It is our understanding that the Department of State is circulating this draft on behalf of the House Foreign Affairs Committee (HFAC) staff as a possible substitute to H.R. 5613, the "Prohibition Against the Training or Support of Terrorist Organizations Act of 1984." The Department of Justice has many concerns and questions about this draft bill for licensing "services."

Although we appreciate the difficulty of developing an acceptable alternative to the approach taken in the services bill submitted by the President to the Congress (H.R. 5613), the HFAC staff draft appears to us to contain numerous policy and technical problems. The draft in our judgment will allay few, if any, of the concerns that were raised about H.R. 5613 in the Congress and by the public. The draft does not contain a findings and purposes section. The definitions are insufficient. The draft lacks the various safeguards that have been built during recent years into comparable legislation, such as the Arms Export Control Act (22 U.S.C. 2751 et seq.), the Export Administration Act (50 App. U.S.C. 2401 et seq.) and the International Emergencies Powers Act (50 U.S.C. 1701 et seq.). The absence of clear findings and purposes to guide the President's discretion, the inadequacy of the present definitions, and the non-incorporation of the procedural safeguards found in comparable laws make the draft bill subject to a serious challenge on vagueness and other constitutional grounds.

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Moreover, in order to implement the draft it might require the creation of a substantial bureaucracy to establish the required regulations, determine what services are to be licensed, monitor compliance with the regulations, and review the adequacy of the regulations in light of changing world conditions. Furthermore, unless the regulations exempt certain friendly foreign governments, such as our NATO allies, any American person or firm providing the covered services to or working for a military, intelligence, or police agency of a foreign government would be required to obtain a license. This proposal could impose considerable and needless burdens upon legitimate American business and may adversely affect trade relations with many countries. The draft goes beyond the limited scope of H.R. 5613 as introduced, or the Working Draft of June 8, 1984, wherein the Administration agreed to some changes to H.R. 5613 in order to secure acceptance by the Congress of the measure. To facilitate further review of the HFAC staff draft, we are forwarding under separate cover a list of specific questions which in our judgment should be addressed during the Administration's review of this licensing proposal.

Accordingly, until the Department has more time to examine this draft and to obtain satisfactory responses from the Department of State to our concerns, we cannot support the draft legislation as a substitute to H.R. 5613 (or S. 2626) or the Working Draft of June 8, 1984.

Sincerely,
(Signed) Robert A. McConnell

Robert A. McConnell
Assistant Attorney General

Concerns and Questions of the Department
of Justice About the House Foreign Affairs Committee
Staff Draft Bill to License the Provision of Services

What problem in the Working Draft of June 8, 1984, except perhaps designation, does this draft bill purport to cure?

Why are there no findings in the draft bill? Why is there no statement of purpose?

Is the draft bill intended to apply to activities of the U.S. Government? If so, should it?

Why was the forfeiture provision of H.R. 5613 not included?

Why wasn't the special venue provision for extra-territorial violations contained in H.R. 5613 included?

Isn't there a need to define "foreign government" and to ensure that it covers the local, state, and national components of the foreign government?

Why wasn't the definition of "intelligence agency" in H.R. 5613 used?

Why wasn't the definition of "national of the United States" in H.R. 5613 used?

Why wasn't the definition of "permanent resident alien of the United States" in H.R. 5613 used?

Should "United States" be defined in terms of its use in the geographical sense? What about using the definition of "State" in H.R. 5613?

Why was the distinction in H.R. 5613 between "United States private entity" (i.e., victims) and "United States person" (i.e., supplier of the services) dropped? Why are foreign contractors of the U.S. Government and foreign employees of the U.S. Government no longer protected?

Is there to be judicial review of any of the regulations? If so, when can such review take place? In a civil proceeding? In the actual criminal prosecution?

Is there going to be a mandated periodic administrative review of the licensing regulations to ensure "currentness?"

Why is there no mechanism to ensure consultation within the Executive Branch in establishing the licensing regulations?

Is the rulemaking process going to be subject to the Administrative Procedures Act (APA)?

Are individual license applications going to be subject to the APA?

What agency is supposed to investigate violations of the proposed Act?

Why is there no emergency exception to the thirty day notification to Congress on new or revised regulations?

Why is there no specific coverage of conspiracy and false application violations in subsection (d) to ensure the enhanced penalties for such violations? Shouldn't there be an attempt provision?

Why isn't the solicitation and recruitment provision made part of the criminal provisions in subsection(d)? Is it really intended to require a license to solicit (e.g., need a license to put an ad in a magazine)?

Why is the draft bill still tied to international terrorism? Doesn't this invite the challenge of licensing "good" terrorists and denying licenses to "bad" terrorists? If the concept of "international terrorism" is to remain in the draft bill, shouldn't it be defined?

Why are groups and factions still included? (They provoked the most concern.) Are we going to require American citizens or our resident aliens to get a license to serve with the "contras" or other factions?

Are we going to require licenses for "serving in or with" the military, intelligence, or police agencies of all non-U.S. governments? Including our NATO allies? Or are we going to designate only certain countries or groups for which you need a license? How do you determine such countries or groups? Isn't this just another form of "designating?"

Who is going to describe the regulated services? How broad will these services be? Must they directly relate to a terrorist event? Will they apply to all foreign governments or only to specified foreign governments or groups?

Are the proponents of the draft aware that a successful criminal prosecution under it would entail proof that the defendant intentionally avoided compliance with his legal duty (i.e., need for a license) of which he had at least a general awareness?

Why has the rulemaking authority been raised to the level of the President instead of the Secretary of State? Can the President delegate the authority?

Should there be a provision to void any existing contract in violation of any new or revised regulation when the regulation becomes effective? Should there be a provision that specifically precludes any liability against the U. S. Government for terminating such contracts?